No. 126

In the Supreme Court of the United States

OCTOBER TERM, 1944

CHARLES E. MERRILL, PETITIONER

v.

JOHN L. FAHS, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF FLORIDA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	1
Statutes and regulations involved	2
Statement	2
Argument	2
Conclusion	12
Appendix	17

CITATIONS

Cases:	
Bristol v. *Commissioner*, 42 B. T. A. 263	14
Commissioner v. *Bristol*, 121 F. 2d 129	13
Empire Trust Co. v. *Commissioner*, 94 F. 2d 307	12, 13
Ferguson v. *Dickson*, 300 Fed. 961	12
Humes v. *United States*, 276 U. S. 487	17
Jones v. *Commissioner*, 1 T. C. 1207	14
Lasker v. *Commissioner*, 1 T. C. 208	14
Lasker v. *Commissioner*, 138 F. 2d 989	13, 14, 15
McCaughn v. *Carver*, 19 F. 2d 120	12
Merchants Bank v. *Commissioner*, 320 U. S. 256	17
Robinette v. *Helvering*, 318 U. S. 184	17
Sanford, Estate of, v. *Commissioner*, 308 U. S. 39	14
Smith v. *Shaughnessy*, 318 U. S. 176	14
Stubblefield v. *United States*, 6 F. Supp. 440	12
Wemyss v. *Commissioner*, 2 T. C. 876	14
Statutes:	
Compiled General Laws of Florida, Sec. 5507	8
Florida Laws of 1939, c. 18999, p. 16	9
Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 302	18
Revenue Act of 1932, c. 209, 47 Stat. 169:	
Sec. 501	18
Sec. 502	18
Sec. 503	18
Sec. 804	13, 16, 19
Revenue Act of 1938, c. 289, 52 Stat. 447, Sec. 22	13, 16, 19
Miscellaneous:	19
Treasury Regulations 79:	
Art. 1	20
Art. 8	15, 16, 20
Treasury Regulations 101, Art. 22 (b) (3)-1	21

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OPINIONS BELOW

The opinion of the District Court (R. 65–71) is reported at 51 F. Supp. 120. The opinion of the Circuit Court of Appeals (R. 87-92) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 3, 1944 (R. 98). Petition for a writ of certiorari was filed June 3, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

In 1939 the petitioner transferred funds to an irrevocable trust for the benefit of his wife in accordance with the terms of an antenuptial agreement between them.

The question is whether the amount of this transfer is taxable as a gift under the provisions of Section 501 of the Revenue Act of 1932; the answer depends upon whether the transfer was made upon "adequate and full consideration in money or money's worth" within the meaning of Section 503 of that Act.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth in the Appendix, *infra*, pp. 18–21.

STATEMENT

The facts which were found by the District Court (R. 57–64) from the parties' stipulation (R. 7–12) and from certain documentary exhibits (R. 12–56) may be stated as follows:

The petitioner was born in 1885 in Florida, of which state he was a citizen during the pertinent taxable year. He was a citizen of New York, however, at the time of the proceedings herein. (R. 57.)

On March 8, 1939, petitioner was married to one Kinta Desmare at Pensacola, Florida. At the time of the marriage petitioner was possessed of some $5,000,000 worth of property; Miss Des-

mare's net financial worth at that time was negligible. (R. 57.)

Miss Desmare had never previously been married but petitioner theretofore had been twice married and divorced. By the first wife he had two children, both of whom were then living and one of whom was married and had two children. Petitioner also had another child living, the issue of his second marriage. Shortly before his marriage to Miss Desmare petitioner had been called upon to defend a divorce proceeding in which heavy money demands were made upon him by his second wife; he desired to safeguard and protect his dependents against future contingencies and the obligations which he had. (R. 57.)

Before making any definite matrimonial arrangements with Miss Desmare, petitioner consulted his attorney with reference to the Florida dower statute and the feasibility of making a valid prenuptial agreement to adjust property rights between himself and his prospective wife. Being informed as to such matters, petitioner told Miss Desmare of his previous marital affairs and of his desire to provide for his family by previous marriages. He also advised her of his financial condition and the nature of his business and informed her of his wish to enter into a prenuptial agreement. (R. 57–58.)

Miss Desmare was agreeable to the idea and preferred some form of immediate payment in

consideration and exchange for any statutory dower, widow's allowance, or other rights to which she would become entitled by the contemplated marriage (R. 58).

As a result of these conferences an antenuptial agreement was prepared and executed by the parties at Pensacola, Florida, on March 7, 1939, the day prior to their marriage (R. 12–19). After reciting (R. 12–14) the reasons and motives of the contracting parties, the antenuptial agreement stated (R. 14–16)—

> That in consideration of the premises and of the solemnization of the aforesaid intended marriage and of the sum of One ($1.00) Dollar paid by the first party [taxpayer] to the second party [Miss Desmare] * * *
>
> I
>
> * * * [the second party] has granted, remised, released, relinquished, conveyed and forever quit-claimed and by these presents does grant, remise, release, relinquish, convey and forever quit-claim upon the said Charles E. Merrill, party of the first part, his heirs, personal representatives and assigns:
>
> (a) All of the right, title and interest which she may acquire as wife or widow of the first party in all of the lands, tenements and hereditaments of which the first party may be seized at the time of the marriage of the parties or at any time thereafter.

(b) All of the right, title and interest which she may acquire as the wife or widow of the first party in and to any and all personal property, tangible or intangible, which the first party may own at the time of the marriage or at any time thereafter.

This conveyance includes all properties, wheresoever situated, and every right pertaining thereto whether of dower, election, participation, inheritance or other title or allowance. Second party hereby waives, discharges and releases every interest, claim or demand of whatsoever kind or description, in law or in equity, that may accrue to her or which she may hereafter acquire as wife or widow, in the real and personal property now or hereafter owned by the first party; so that neither the second party nor her heirs, executors, administrators or assigns, or any of them, shall have or be entitled to assert any right, claim or demand whatsoever against any of the properties or estate of the first party but shall be forever barred and excluded therefrom.

The second party agrees that she will at any time and from time to time upon the request of the first party or his heirs, executors, administrators or assigns, execute, acknowledge and deliver any and all mortgages, deeds of conveyance, bills of sale or instruments of release of any of the real or personal property of which the first party may be seized or possessed at the time of

the marriage of the parties or at any time thereafter, so that such mortgages or instruments of conveyance or release when executed and recorded, may show good record title to the properties thereby encumbered, conveyed or affected: The first party or his heirs, executors, administrators or assigns, shall nevertheless have the right to encumber or convey or otherwise deal with reference to any or all of such real or personal properties without the second party joining in the mortgages or instruments of conveyance and every such mortgage or other instrument, without the signature of the second party, shall fully and effectively encumber or convey or operate upon the property affected thereby.

Petitioner's undertakings, as set forth in the antenuptial agreement (R. 16–18), included the following (R. 16, 59–60):

(a) That within ninety days from the date of said marriage, he will create an irrevocable trust, of $300,000.00 in cash or securities of equivalent value, the provisions of which shall conform to the wishes heretofore expressed by the said Kinta Desmare, that is to say the trust indenture shall provide for the said Kinta Desmare to receive during and throughout her lifetime the net annual income from said trust funds, such income to be paid her quarterly; upon the death of the said Kinta Desmare, if she be survived by her mother Mrs.

> Louis Desmare, the income from the trust funds to be paid to said mother during and throughout her lifetime; upon the death of the said Kinta Desmare, if she be not survived by her mother or upon the death of the latter, if she shall survive her said daughter, the entire trust estate to become the property of and the principal and net income therefrom to be disbursed and paid as follows * * *.

In addition to the foregoing, petitioner agreed to provide by will an additional trust of $300,000 for Miss Desmare's benefit; a testamentary trust in that amount was also to be created by him for the benefit of their issue if any (R. 17–18).

The contract provided for its construction in accordance with the laws of the State of Florida (R. 60).

Pursuant to this agreement petitioner created an irrevocable trust to which he transferred $300,000 in cash on May 29, 1939.[1] On that date also petitioner executed his will which contained clauses designed to carry out the additional provisions of the ante-nuptial contract (R. 60–61). Prior to their execution, the trust indenture and will were approved by the personal attorney of the third Mrs. Merrill, as conforming in all respects to the requirements of the agreement (R. 61).

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[1] The terms of the trust are set forth at pp. 19–27 of the record.

The several transactions between petitioner and Kinta Desmare were entered into in good faith (R. 61).

On May 29, 1939, when the $300,000 was transferred to the Desmare trust, petitioner's net worth (apart from the creation of the trust fund on that date) was approximately the same as it had been on March 7, 1939, the date of execution of the pre-nuptial contract, and on March 8, 1939, the date of petitioner's marriage to Miss Desmare (R. 57, 61). His assets consisted principally of cash, stocks, bonds, and similar securities of a value in excess of $5,300,000. In addition he owned his Palm Beach home valued at $100,000 and other Florida real property valued at $35,000 (R. 61).

The dower statute of Florida in effect at the date of the prenuptial agreement was Section 5507 (1), Compiled General Laws of Florida. It specified (R. 61–62) that the widow of any decedent might elect to take dower—

> which dower shall be one-third part in fee simple of the real property owned by her husband at the time of his death or which he had before conveyed, whereof she had not relinquished her right of dower as provided by law, and one-third part absolutely of the personal property owned by her husband at the time of his death, which said dower, both real and personal, shall be free from all liability for the debts of the de-

cedent, all estate and inheritance taxes and all costs, charges and expenses of administration: Provided, however, that if a decedent be survived by his widow, and lineal descendants and that none of such lineal descendants are also the lineal descedents of such widow, then the dower shall be limited to the portion of the estate of the decedent to which the widow is entitled under the law of descent and distribution, to wit, a child's part, which said dower shall also be free from all liability for the debts of the decedent, all estate and inheritance taxes and all costs, charges and expenses of administration.

The dower statute was changed on April 21, 1939, to subject the widow's rights to the husband's debts and to estate taxes.[2]

On March 7, 1939, the date of execution of the prenuptial contract, Miss Desmare was 35 years of age and petitioner was 53 (R. 57, 62). An actuarial calculation based upon the Actuaries or Combined Experience Table of Mortality, with interest at 4 percent, was introduced into evidence before the District Court under a stipulation of the parties admitting its correctness "if it is possible to place a money value upon the wife's dower interest under the facts in this case"; the calculation showed that the reversionary interest of a person aged 35 in a fund becoming payable upon

[2] Fla. Laws, 1939, p. 16, c. 18999.

the death of a person aged 53 per $1 of the fund is .422604 (R. 62).

On May 11, 1940, petitioner filed with the Commissioner of Internal Revenue his gift tax return for the year 1939 in which he reported the creation of the irrevocable trust and the transfer to it of $300,000, and stated that (R. 62–63):

> This trust was created pursuant to an ante-nuptial agreement executed March 7, 1939 between the taxpayer and his wife, wherein, in consideration of the solemnization of the marriage and Mrs. Merrill's promise to release and relinquish her inchoate dower and other marital rights in his property, the taxpayer agreed to create this trust for the benefit of his wife, her mother, and the remaindermen designated by Mrs. Merrill in said agreement * * *
>
> In view of the net worth of the taxpayer and the value of the real estate and other property owned by him at the time the trust was created and the other circumstances set forth in said ante-nuptial agreement, and in view of the absence of any donative intent on the part of the taxpayer, he has excluded the amount of the transfer to this trust from Schedule A of the Gift Tax Return for 1939 on the ground that the relinquishment by Mrs. Merrill of her inchoate dower and other marital rights in his property constituted a valuable consideration in money or money's worth at least equal to

> the sum of $300,000, the amount transferred to the trust in question.

Mrs. Merrill also filed a timely gift tax return for the year 1939, reporting the trust created for her pursuant to the antenuptial agreement and saying (R. 63)—

> The taxpayer is advised that she became a purchaser of the corpus of this trust for a consideration commensurate with the amount of said corpus, to wit, $300,000.

In filing their income tax returns for the calendar year 1939, neither taxpayer nor his wife, the former Kinta Desmare, reported income or profit on these transactions (R. 63).

The Commissioner assessed the instant gift tax deficiency on the ground that petitioner's transfer of $300,000 to the trust in 1939 was subject to the gift tax for that year. Petitioner paid the amount so assessed, filed due claim for refund, and instituted this suit upon the Commissioner's rejection of the claim. (R. 63–64.) The District Court held (R. 64 *et seq.*) that the release of a wife's statutory property rights may constitute full and adequate consideration in money or money's worth for a transfer to her by the husband, within the meaning of Section 503 of the Revenue Act of 1932; that whether or not it does constitute such consideration is a question of fact; and that in the case at bar the evidence established that Miss Desmare's release of her statutory rights under the prenuptial agreement did constitute

adequate and full consideration in money or money's worth for the transfer by petitioner in 1939 of the $300,000 here involved.

The Circuit Court of Appeals, reversing the District Court, held that the amount of the transfer should have been included in petitioner's gift tax return on the ground that the consideration for the transfer was not susceptible of monetary evaluation and therefore that its adequacy could not be and was not here established (R. 87–92). A dissenting opinion below (R. 92–97) was of the view that the consideration was susceptible of evaluation and that its adequacy had been established.

ARGUMENT

The Government contends that this case was correctly decided below and that it is distinguishable from the Circuit Court of Appeals decisions which petitioner (Pet. 5) asserts to be opposed.[3] However, the importance of the question presented is conceded; and it may also be admitted that a conflict exists between the reasoning of the court

[3] The cases cited by petitioner (Pet. 5) as conflicting with this one [*McCaughn* v. *Carver*, 19 F. 2d 126 (C. C. A. 3d); *Ferguson* v. *Dickson*, 300 Fed. 961 (C. C. A. 3d); *Stubblefield* v. *United States*, 6 F. Supp. 440 (C. Cls.)] were estate tax cases governed by earlier statutes which did not require that there should be "adequate and full," but merely that there should be "fair," consideration in money or money's worth. *Empire Trust Co.* v. *Commissioner*, 94 F. 2d 307 (C. C. A. 4th), held that a release of marital rights did not constitute "adequate and full" consideration under Section 303 (a) (1) of the Revenue Act of 1926, 44 Stat. 72, which supplanted the previous estate tax provision.

below and the view taken by the Circuit Court of Appeals for the Seventh Circuit in *Lasker* v. *Commissioner*, 138 F. 2d 989, involving a post-marital settlement.[4]

The issue is whether Section 503 of the Revenue Act of 1932 (Appendix, *infra*, p. 19), which in substance provides that if property is transferred for less than adequate and full consideration in money or money's worth, the excess shall be deemed a gift, contemplates that the release of dower, curtesy, and analogous marital rights may constitute consideration. The Circuit Court of Appeals for the First Circuit, in the case of *Commissioner* v. *Bristol*, 121 F. 2d 129, held upon facts very similar to those at bar that a release by pre-nuptial agreement of rights in a husband's property did not constitute consideration within the purview of the statute. The court reasoned from *Empire Trust Co.* v. *Commissioner* (*supra* note 3), involving a section of the Revenue Act of 1926 which was identical to the present gift tax provision; from the present express statutory exclusion of releases of marital interest as consideration under the estate tax law;[5] and from the Congressional purpose that the gift tax should

[4] A pre-marital agreement, entered into by the parties, was considered to have been abrogated under its own terms by a subsequent separation.

[5] This exclusion was added in 1932 in Section 804 of the Revenue Act of that year, Appendix, *infra*, p. 19. It was regarded as declaratory of the previous law in both the *Empire Trust Co.* case and *Commissioner* v. *Bristol*.

supplement the estate tax,[6] that a similar exclusion applied to the gift tax.[7] The Government asserted this view in the instant case and also in *Lasker* v. *Commissioner, supra.*

The court below did not pass upon this contention, resting its decision (R. 87–92) on the grounds (1) that when the prenuptial contract was entered into, the rights of the future wife in the petitioner's property were purely prospective and that all she actually gave as consideration was her consent to the marriage, which was not "money or money's worth" as the statute requires, and (2) that the taxpayer could not sustain the burden which lay upon him of proving the adequacy of the consideration moving to him where, as here, the rights released were not susceptible of accurate monetary measurement because of their future and contingent nature.[8]

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[6] See *Smith* v. *Shaughnessy*, 318 U. S. 176; *Estate of Sanford* v. *Commissioner*, 308 U. S. 39.

[7] The Court reversed the decision of the Board of Tax Appeals, 42 B. T. A. 263. The Board (now the Tax Court) has not followed the Court's decision in the *Bristol* case, but has reached a similar result in some instances. Cf. *Wemyss* v. *Commissioner*, 2 T. C. 876, appeal pending (C. C. A. 7th); *Jones* v. *Commissioner*, 1 T. C. 1207; *Lasker* v. *Commissioner*, 1 T. C. 208.

[8] As petitioner's prospective wife, Miss Pesmare had no rights whatever in his property. Later, as his wife, she had only inchoate rights, subject to the hazards of changes of residence, such as actually took place; changes in the Florida law, such as likewise occurred; and freedom on the part of the husband to dispose of his personalty by his own acts during his lifetime.

Thus the court below and the Circuit Court of Appeals for the First Circuit have reached the same result upon different grounds.

The decision in the *Lasker* case in the Seventh Circuit was influenced by the view, which the court thought the Government conceded, that there was adequate consideration because the transfer might be regarded as made in the ordinary course of business, at arm's length, and free from any donative intent, within the meaning of Article 8 of Treasury Regulations 79 (Appendix, *infra*, p. 20). The court expressly refused to follow the reasoning in the *Bristol* case in the First Circuit that the statutory exclusion of releases of marital interest as consideration for estate tax purposes is also applicable to the gift tax. The court further held that marital rights, including in that case the right to support, and consequently their release, may have an ascertainable monetary value which, in the particular instance, clearly exceeded the provision made for the wife. In respect to the possibility, under the statute, of attaching a monetary value to the release of marital rights in property, the two cases embody conflicting reasoning; but the *Lasker* case is distinguished by the court below because of the post-marital execution of the Lasker agreement as contrasted with the pre-marital conclusion of the agreement here. The surrender of the right to support in the *Lasker* case constitutes an additional differentiating factor.

The Government did not intend to concede in the *Lasker* case, and does not now, that marital settlements may properly be treated as transfers at arm's length in the ordinary course of business within the meaning of Article 8 of Treasury Regulations 79 (Appendix, *infra*, p. 20). If they were, it would not be necessary to estimate the value of the consideration moving from the wife at all, since such transactions, by reason of their very nature, "will be considered as made for an adequate and full consideration in money or money's worth." The petitioner does not contend that such should be the rule applicable to marital agreements.

The real questions involved in the present case are whether the clear meaning of Section 804 of the Revenue Act of 1932 (Appendix, *infra*, p. 19), in the light of its history (*supra*, p. 13), does not require that the same meaning be attached to Section 503 (Appendix, *infra*, p. 19) here involved and, if it does not, whether the nature of the marital rights relinquished does not prevent a value in money or money's worth from being assigned to them under the latter Section.

There is no square conflict between the decision below and that of any other Circuit Court of Appeals. The decision below is right for the reason advanced by the Circuit Court of Appeals for the First Circuit in the *Bristol* case and also, as the opinion below fully states (R. 91 *et seq.*),

because of the highly fluid and contingent nature of the interests released to the petitioner under the agreement in question,[9] which prevents the assignment of a monetary value to them.[10]

CONCLUSION.

The petition for a writ of certiorari may properly be denied because of the correctness of the result below and the absence of a direct conflict between this decision and that of any other Circuit Court of Appeals. The issues involved are, however, important for the future administration of the tax laws. It is apparent, despite the present absence of square conflict, that different Circuit Courts of Appeals are likely to decide similar cases involving these issues differently in the future. The Court may upon these grounds deem it wise to grant certiorari.

Respectfully submitted.

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[9] *Cf. Merchants Bank* v. *Commissioner*, 320 U. S. 256; *Robinette* v. *Helvering*, 318 U. S. 184; *Humes* v. *United States*, 276 U. S. 487.

[10] *Cf.* footnote 7, *supra.*

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (b) To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, curtesy, or by virtue of a statute creating an estate in lieu of dower or curtesy;

Revenue Act of 1932, c. 209, 47 Stat. 169:

> SEC. 501. IMPOSITION OF TAX.
>
> (a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual * * * of property by gift.
>
> (b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; * * *
>
> * * * * *
>
> SEC. 502. COMPUTATION OF TAX.
>
> The tax for each calendar year shall be an amount equal to the excess of—
>
> (1) a tax, computed in accordance with the Rate Schedule hereinafter set forth, on the aggregate sum of the net gifts for such

calendar year and for each of the preceding calendar years, over

(2) a tax, computed in accordance with the Rate Schedule, on the aggregate sum of the net gifts for each of the preceding calendar years.

* * * * *

SEC. 503. TRANSFER FOR LESS THAN ADEQUATE AND FULL CONSIDERATION.

Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this title, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

SEC. 804. RELINQUISHMENT OF DOWER, ETC., AS CONSIDERATION.

Section 303 (d) of the Revenue Act of 1926 is amended by adding at the end thereof a new sentence to read as follows:

"For the purposes of this title, a relinquishment or promised relinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, shall not be considered to any extent a consideration 'in money or money's worth'."

Revenue Act of 1938, c. 289, 52 Stat. 447:

SEC. 22. GROSS INCOME.

* * * * *

(b) *Exclusions from Gross Income.*—The following items shall not be included in

gross income and shall be exempt from taxation under this title:

* * * * *

(3) *Gifts, bequests, and devises.*—The value of property acquired by gift, bequest, devise, or inheritance * * *

* * * * *

Treasury Regulations 79 (1936 ed.):

Article 1. *Imposition of tax.*—* * * The tax is not limited in its imposition to transfers of property without a valuable consideration, which at common law are treated as gifts, but extends to sales and exchanges for less than an adequate and full consideration in money or money's worth. * * *

Art. 8. *Transfers for a consideration in money or money's worth.*—Transfers reached by the statute are not confined to those only which, being without a valuable consideration, accord with the common law concept of gifts, but embrace as well sales, exchanges, and other dispositions of property for a consideration in money or money's worth to the extent that the value of the property transferred by the donor exceeds the value of the consideration given therefor. However, a sale, exchange, or other transfer of property made in the ordinary course of business (a transaction which is bona fide, at arm's length, and free from any donative intent), will be considered as made for an adequate and full consideration in money or money's worth. A consideration not reducible to a money value, as love and affection, promise of marriage, etc., is to be wholly disregarded, and the entire value of the property transferred constitutes the amount of the gift.

Treasury Regulations 101, promulgated under the Revenue Act of 1938:

> Art. 22 (b) (3)–1. *Gifts and bequests.* * * * An amount of principal paid under a marriage settlement is a gift. * * *

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